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CLASSIFICATION OF LAW.*

A generally accepted and convenient classification of law of sufficient scope to serve as the basis for the arrangement of the laws of any nation at any stage of its development, is something the world has not yet known. Such a classification, if we ever have it, will give the bench, the bar, students of history and the people at large, a better comprehension of the subject-matter than they had before. The aid it will supply will be much the same as the aid which meridians of longitude and parallels of latitude supply to the navigator, the traveler, and all who need an extended and accurate view of the earth's surface. The classification contained in this article is, I believe, more convenient than any other yet proposed. That it may be of much use, however, it must be generally accepted.

The term, *municipal law*, or more briefly *law*, as used in this paper, means two things: 1. It means the rules in accordance with which the courts of a State decide cases, that is, the rules of conduct prescribed, directly or indirectly, by the holders of sovereign power in a State to all persons within its territory. 2. It means the structure of the government. (For an elucidation of the phrase, "the structure of the government," see the first head of the classification of law given, below). It is almost unnecessary to say that the word, law, does not here denote physical laws, the rules in accordance with which matter exists and moves. Neither does it directly denote moral laws, the rules of human conduct which God has prescribed to men. Municipal law should be

* A skeleton of the classification of law stated in this paper was published by me in a letter to *The Green Bag*, for March, 1890. The classification, more or less elaborated, was afterward printed in one or two other legal periodicals and in pamphlet form. The present paper owes its existence to my desire to further explain it, and to bring it to the attention of a class of readers, whom it has not yet reached.

the expression of moral law, and to a great extent always is so, yet, under the most favorable circumstances it is incapable of expressing a large part of moral law and must be therefore permanently narrower in its scope. It does not denote all commands of the sovereign and his agents, or even all their commands in the form of general rules; for example, it does not embrace general orders of an executive officer, such as the secretary of the treasury, to his subordinates. As pointed out by another writer, it does not embrace infantry tactics, although they be established by the State.*

As used in this paper the word, law, does not include specific commands of the sovereign or his agents, whether they be legislative, executive or judicial officers or bodies, nor general orders of executive officers or boards to their subordinates.

The greater part of the law administered by the courts and to be arranged in the following classification, has never in any English speaking country, and probably never in any country, been enacted in the form of a statute. In civilized countries at present, it is so much of the current morality of the nation as the courts believe can be administered by them with advantage to the people, modified by statutes, including in that term written constitutions, treaties and ordinances, and modified by rules established by prior judicial decisions. The order of authority of these sources of law is, (1) statutes; (2) rules based on precedents; (3) current morality. The general order of historical development is the reverse order.

The word, *right*, as used in municipal law and in the classification of law given hereafter, denotes two groups of attributes attached to persons. 1. It usually means a power in one person, called the right-holder, to force another, called the duty-bearer, by aid of the courts of justice to do or to forbear to do some act. For example, A has a legal right against B to enforce through the courts payment of B's promissory note which A holds. Such a right may be called

* Gray, 6 Har. Law. Rev. 21.

a protected right. The class includes a right protected indirectly by the courts, although directly by self-redress. 2. When the word, right, is applied to the rightholder's own acts, it means absence of legal prohibition. For example, a man has a right to practice such forms of religious worship as he chooses, not injurious to the State; he has a right to express his opinions about public affairs and about men in public office. Such a right may be called a permissive right. If the State goes further than abstaining from prohibiting the man's act, and protects him in doing it, against interference by other men, he has a right under the first definition of the term as well as under the second. The word, right, is not here used, as it often is in common speech, as synonymous with justice.

Rights are *primary*, that is, given for their own sake irrespective of any prior breach of law, or *secondary*, given in substitution for a violated primary right, or to enforce a primary right or another secondary right. Thus, B's right as a citizen of a State to vote at elections, under such limitations as the law of the State may prescribe, his right of personal security, that is, his right against persons generally not to have his person touched or interfered with, his right of dominion over the house he owns and occupies, and his right to have C perform his contract to pay a sum of money, are all primary rights. B's rights to remedies for the violation of these primary rights are secondary rights.

In the division of law as given below into nine great groups, under each primary right are included the secondary rights arising from it, whether they are substitutes for a violated primary right, or are rights to remedies, such as an action at law to recover money damages, a suit in equity or a mandamus to enforce the specific performance of a duty, or an injunction to prevent the threatened violation of a right. An exception is made as to so much of the law of remedies as can be stated more conveniently by itself under the seventh head, Procedure. As a duty never exists without a

right-holder to assert it, who is either a private person or the State, it is generally unnecessary to consider duties apart from rights. In the classification, in the absence of special facts, calling for a departure from the general rule duties are placed under their corresponding rights.

The classification of law presented in this paper differs from the usual classification of Roman law, among other things, by grouping under the several primary rights the remedies for their violation and the duties corresponding to such rights.

A legal *power*, as the term is used in this classification of law, is capacity to do an act which persons generally are under a legal duty to recognize as lawful. In many instances a person has legal power to do an act without having a legal right to do it. For example, a judge has legal power to render a wrong decision, but no legal right to do it. A corporation has legal power to do many *ultra vires* acts, but no legal right to do them.

A *right in rem* is a right availing against persons generally, and is a right to forbearances. The duty-bearers are indeterminate. Only a few of them can ever be specifically known. Any one in the State may become a duty-bearer. For example, a man's right to personal security, his right of dominion over land and cattle owned by him, his right to a patent for an invention granted him by the government, are rights *in rem*. A man's right of ownership over a tract of land or a movable is a typical right *in rem*. He has a right of dominion over specific matter and a right against men generally that they forbear to interfere with it. From this typical example the class, rights *in rem*, extends to other rights more or less similar. In this classification of law a right *in rem* denotes not only full ownership, but lesser rights into which the full right may be split, *e. g.*, it includes an easement, a leasehold, a reversion, a lien. It includes a man's rights of dominion over himself and over other men. It includes also a patent for an invention, a copyright, a right

to a trade-mark. In these cases there is no specific matter, inanimate or living, over which dominion is exercised, but there is a right against men generally that they forbear to interfere with a certain class of acts by the right-holder, similar to those he would exercise over specific matter.

A *right in personam* is a right availing against a specified individual or individuals, and is a right either to acts or to forbearances. For example, a promisee's right against a promisor to have the latter perform his contract is a primary right *in personam*. All rights to remedies for violated rights *in rem* are rights *in personam*.

Further explanation and definition of terms will be given in the course of the statement of the proposed classification of law and at its close.

A nation's law, as it exists at any date in the nation's history, whether expressed by a written constitution, by statutes, by case law, by customs, or, as is now usually the case in civilized countries, by all of these in combination, may be conveniently grouped under nine great heads, as follows:

1. **Structural Law**, which relates to the organization or structure of the government; which fixes the number and names of legislative, executive and judicial offices and boards, and of territorial and other public corporations; which prescribes how such offices, boards and corporations shall be created and destroyed, filled and vacated; and which prescribes the powers, rights and duties attached to such offices, boards and corporations, the remedies to enforce such powers and rights, and the penalties by which the performance of such duties is coerced. This head includes the jurisdiction and rights of courts, and the powers and rights of judges and juries as public officers and constituent parts of courts. This head and the next may be conveniently denominated, Public Law.

The term, constitutional law, has been avoided as the name of this head because it denotes much extrinsic matter, and does not include the whole of the subject. As commonly

used it embraces all matter contained in a written constitution, although such matter does not relate to the structure of government. For example, a provision that railway corporations shall not consolidate is part of the sixth head of the classification, Status, not of structural law, but such provision is constitutional law in the State of Illinois because embodied in the constitution of that State. On the other hand, the phrase, constitutional law, is too narrow. The greater part of the law governing both major and minor public agents is contained in statutes, and hence is not denoted by the phrase. The expression, organic law, has been avoided as the name of this head, because it does not suggest the law governing minor government agents as well as the law governing the legislature and the principal judicial and executive officers of a State.

2. **Public Law, Part Two**, which relates to the rights of a State against persons, and the rights of persons against the State and Public officers as such. Under its first branch it includes, (1) criminal law, which defines crimes and their punishment; (2) criminal procedure; (3) many rights to the performance of active duties by subjects, such as the payment of taxes, and the performance of military and jury duty; (4) the rights of the States as an owner of property, and as a contractor; (5) civil suits by the State. It includes also, much of so-called administrative law, *e. g.*, much of the law governing the currency and weights and measures. Under its second branch it includes (1) the primary rights of individuals against the State, such as the right of an elector of a republic to participate in the government of his country by voting; and (2) the enforcement of such rights against the State, *e. g.*, by suits against it, brought with its consent.

To speak of the rights of a person against the State may seem at first blush inaccurate to those who hold with Austin that the sovereign cannot be a duty-bearer. It does not seem to violate any legal conception, however, to regard the

sovereign as a duty-bearer, when he voluntarily submits to be sued in his own courts either by name or by suits brought nominally against his officers.

3. **Law of Persons**, which relates to a person's rights of dominion over his own body, life and reputation and over the body, life and reputation of other persons. Examples of rights of the first group are, the right of bodily security; the right of occupation, *e. g.*, a person's right to do whatever he likes wherever he is; the right of residence; the right of locomotion; the right of free speech; the right of reputation, protected by the actions of slander and libel; the right to worship freely; and the right to assemble. Since the abolition of slavery, in this country, rights over others are here of small importance, and are confined chiefly to the family relations. This head includes, in addition to rights *in rem* as to one's self and over others, (1) non-contractual rights *in personam*, closely related to such rights *in rem*; (2) contractual rights, which are closely related to such rights *in rem*, and which are subtracted from the head, Contracts, as given below; (3) torts, *i. e.*, injuries, which violate the primary rights involved, as for example, an assault violating a person's primary right of personal security, and (4) the right-holder's remedies therefore, *e. g.*, a *habeas corpus* suit as a remedy for false imprisonment.

The name, Law of Persons, given to this head of the classification of law, is used in deference to established usage and because we have no better one. It is to be remembered, however, that the group of rights comprising this head is no more closely connected with persons than are the other branches of the law.

The head, Law of Persons, and the next three may be conveniently grouped together under the term, Private Law, which primarily signifies the rights of one private person against another including the rights of a private person against a public officer, except so far as the latter is exempt from personal liability as an agent of the State.

4. **Property**, which relates (1) to a person's rights of dominion over land, including water; (2) to a person's rights of dominion over inanimate movables, including fixtures, and over animals; and (3) to patent rights, copyrights, trade-marks and their like, and special privileges (*i. e.*, franchises), all of which may be described as rights of dominion over indeterminate tangible matter. A right of dominion is a right to use and convey the thing owned and to exclude others from using and conveying it. This head includes, in addition to rights *in rem* (1) non-contractual primary rights *in personam*, closely related to such rights *in rem*, *e. g.*, a landlord's right to demand rent from his tenant; (2) contractual rights which are closely related to such rights *in rem*, and which are subtracted from the head, Contracts, as stated below; (3) torts, violating proprietary rights; and (4) the remedies therefor, *e. g.*, an action at law to recover pecuniary damages for waste, an injunction in equity to restrain waste. It includes the creation, transfer and destruction of rights of ownership, *e. g.*, by deed, by will, by descent, by long possession, by estoppel. The law relating to each estate in land can be conveniently grouped as follows: (1) name, definition and divisions; (2) how created, transferred and destroyed (investitive, transvestitive and divertitive facts); (3) powers, rights and remedies of the owner; (4) duties and liabilities of the owner.

5. **Contracts**, which head relates, for the most part, to the rights of one person against another, arising from agreement. A contract is an agreement to which the law annexes a duty.* This head includes the violation of contracts and the remedies therefor. Contracts, considered as investitive, transvestitive or divestitive facts, *i. e.*, creating, transferring or destroying rights *in rem*, *e. g.*, title to land, a patent for an invention, or entering into the creation or destruction of a status, *e. g.*, in cases of marriage, in the formation and dissolution of private corporations—are treated under the

* Langdell, 1 Har. Law Rev. 56, n. 1.

primary rights to which they relate. The word status, as used in the last sentence, means membership in a legal class of persons; it does not there mean, as in the next great head of law, classes of persons.

This head includes non-contractual primary rights *in personam*, not included under the heads, Law of Persons, and Property, such as, the right to have a surgeon practice his art on the right-holder with skill.

6. **Status**, the law governing exceptional classes of persons, such as minors and lunatics. This head is formed by subtraction from the four preceding heads. It includes the law of private corporations, of partnerships, the law of principal and agent, master and servant, guardian and ward, and a part of the law of family relations. It includes (1) the name and definition of each class and the division of it into sub-classes; (2) the means by which members of each class are created and destroyed; (3) the powers, rights, and remedies of members of each class; and (4) their duties and liabilities.

7. **Procedure**, which comprises such matters relating to the enforcement of primary rights as cannot, on account of their generality, be conveniently treated under the preceding heads. It includes the heads, Pleading, Practice, Evidence, and Measure of Damages and part of the law of Judgments.

The jurisdiction and rights of courts, and the powers and rights of judges and juries as constituent parts of courts, fall logically under the first head of this classification, Structural Law.

8. **General Principles, Rules of Construction and Definitions.**—This head includes the general rules relating to estoppel and negligence. It is convenient to group general principles by themselves, because they are applied under all of the preceding great heads of law, and therefore could be treated under any one of such heads only in an incomplete manner. The principles collected here are secondary principles, which express applications of the two primary prin-

ples, justice and utility, on which all statute and case law as well as morality are founded. These secondary principles have been formulated for the most part in the inquiry into the ethical grounds on which law should be framed, not by an analysis and classification of established legal rights.

9. **The Law of Nations**, the quasi law governing the intercourse of the nation whose law is to be classified with other nations. The variations of law, which are caused by the absence of persons or things from the national territory, or by the occurrence of some transaction abroad, that is, the subject, sometimes denominated, Private International Law, is broken into parts and is distributed to all the great heads of the foregoing classification. Admiralty law, the law of the sea, falls logically under all the nine great heads of law; but for convenience of reference the greater part of it may be collected under the present head.

The foregoing classification admits of considerable latitude in the distribution of the law. For example, the greater part of the law of family relations may be collected either under the head, Law of Persons, or under the head, Status; much of the law relating to remedies may be collected either under the several primary rights to which such remedies relate, or under the head, Procedure. Convenience must decide what shall be done in dealing with the law of a particular country at a given time, keeping in view ease of reference, historical development and scientific arrangement. The classification here given is applicable to past systems of law, which recognize proprietary rights in men, that is, slavery, and proprietary rights in public offices.

The importance of ease of reference in any arrangement of the law for every day use by the bench and bar may make it advisable to arrange the topics comprising the nine great heads of law under each of those heads alphabetically.

The division of rights into legal and equitable, known to American and English law, and similar divisions in the law

of other nations—for example, the division of Roman law into the old Roman law, and the law built up by successive pretorian edicts—have come about by historical development; they have not been formed by a logical analysis of the matter classified. The division of the whole field of law into legal law and equitable law, is a division which crosses the classification set forth in this paper. Under this classification, however, the distinction between law and equity may be preserved. It is always possible, in describing a right, to state that it is recognized and enforced by courts of law or by courts of equity, or by both, and such a statement is sufficient to preserve this distinction. Equity law, as it exists in this country to-day, is not only a system of remedies to enforce primary rights, recognized by courts of law, but it also comprises equitable primary rights, enforced by courts of equity and not recognized by courts of common law; for example, the rights of a beneficiary of a trust, technically called a *cestui que* trust, against his trustee. By far the greater part of equitable primary rights fall under the heads, Property and Contracts. Very few equitable primary rights are found under either head of Public Law or under the head, Law of Persons, or, except as they are property or contract rights, under the head, Status. The application of equitable remedies is also confined, for the most part, to the heads, Property and Contracts. In criminal law there are no equitable primary rights nor equitable remedies.

The distinction between law and equity is by no means the only historical line of distinction to be encountered in a classification of our own law. During the period of the English colonization of America, and at the time of the adoption of the United States Constitution, there were, in England, five systems of courts which administered, not only different remedies to redress violated primary rights, but differed in their recognition of primary rights, *i. e.*, administered somewhat different systems of substantive law. These courts were the common law courts—the ecclesiastical

courts, exercising as part of their jurisdiction probate jurisdiction over personal property, and having exclusive jurisdiction to appoint administrators and to grant a divorce from bed and board—admiralty courts—courts-martial, military and naval—and chancery courts, exercising a general chancery jurisdiction, supplementing and controlling the other courts. Laying out of view courts-martial, the systems of jurisdiction and substantive law, which were administered by these courts, survive in our own law, although the different systems of substantive law are now nearly fused and the jurisdiction of the courts re-distributed.

It will be instructive to compare the arrangement of the matter in several of our more celebrated treatises and compilations, dealing with the general law of some nation, with the classification of law stated in this article, I have selected for the comparison, "Kent's Commentaries," the "Code Napoléon," "Blackstone's Commentaries" and the "Institutes of Justinian."

Chancellor Kent divides his Commentaries on American Law into six parts. Part 1, he devotes to the law of nations; part 2, he devotes to the structural law relating to our national government in its three departments, legislative, judicial and executive; part 3, he devotes to the sources of American law and, under that head, he treats of matters falling, for the most part, under head 8 of the classification in the text, which relates to general principles, rules of construction and definitions; part 4, he devotes to the law of persons and status; part 5, he devotes to personal property, including contracts; and part 6, he devotes to real property. It thus appears that his treatment of structural law is confined to that part of it relating to the national government. As to the structural law of the States of the Union he is silent. Of Public Law, Part 2, as that term is used in the classification given in the text, *i. e.*, the rights of the State (represented in this country by the national government and the governments of the several States of the

Union) against individuals and the rights of individuals against the State, he has almost nothing to say. He does not treat of criminal law and criminal procedure. He treats only incidentally of civil procedure.

The Code Napoléon, treating of French law, is divided into three books. The first book, entitled "Of Persons," is devoted to the topic, citizenship, falling under the head, Public Law, Part 2, and to various topics, such as marriage, divorce and guardianship, falling under the heads, Law of Persons and Status, as those terms are used in the classification of law given in this paper. The second book, entitled "Of Property and the Different Modifications of Property," is devoted to a part of the law of property. It enumerates various kinds of ownership and some of the incidents attached to each kind. The third book, entitled "Of the Different Modes of Acquiring Property," is devoted to the topics, (1) succession, *i. e.*, the transmission of property by descent and by will; (2) contracts; and (3) some matters of procedure, such as the arrest of the defendant in a civil suit. The great heads, Structural Law, and Public Law, Part 2, the rights of the State against private persons, including criminal law and criminal procedure, and the rights of private persons against the State, are not treated, with the exception of the single topic, citizenship. The head, Law of Nations, is not treated at all, and the other great heads, Law of Persons, Contracts, Status, Procedure, are treated only in a very fragmentary manner.*

Blackstone treating of English law divides his Commentaries into four books, preceded by an introduction. The latter he devotes to general topics, most of which fall under head 8 of the classification of law in the text. The first book, entitled "The Rights of Persons," he devotes to the

* It is proper to state that four other codes were promulgated by France between 1804 and 1810 namely (1) the code of commerce; (2) the code of civil procedure; (3) the code of criminal procedure; and (4) the criminal code; these supplement to a considerable extent the deficiencies of the first code.

structural law of the legislative and executive branches of the English government and to the subjects indicated by the title of the book, *i. e.*, the Law of Persons and Status, using these terms as they are used in the foregoing classification of law. The second book he devotes to primary property rights, including some matter on contracts. The third book he devotes (1) to the structural law relating to courts of justice; (2) to torts, *i. e.*, to violations of the law of persons, of property and of status; and (3) to civil procedure, *i. e.*, remedies to redress and prevent torts and violations of contracts. The fourth book he devotes to criminal law and criminal procedure. He devotes no separate space to the second branch of Public Law, Part 2, the rights of persons against the State, nor to the Law of Nations, but touches upon these subjects under other heads. He omits no extensive topics as do Kent and the authors of the Code Napoléon, but his arrangement of matter is not well adapted to show the true relations of its different parts.

At the time the great body of Roman law was digested and codified under the orders of Justinian, an elementary textbook of the Roman law was prepared by his direction, called, the "Institutes."* It is divided into four books. The first book is devoted, (1) to general topics, which, according to the classification of law in the text, would be grouped under head 8 thereof, relating to general principles, definitions and rules of construction, and (2) to the law of persons and status. The second book and a part of the third are devoted to property, including inheritance. The remainder of the third book and part of the fourth are devoted to obligations, *i. e.*, contracts and *quasi* contracts. The remainder of the fourth book is devoted, in great part, to civil procedure, and a few paragraphs at the end are devoted to criminal law and criminal procedure. The three great heads, Structural Law, relating to the organization of

* See a tabular arrangement of Justinian's "Institutes." Hunter, "Roman Law," p. xxvi; Moyle, "Imperatoris Justiniana Institutionum," vol. 2, p. vii.

the government, Public Law, Part 2, relating to the rights of the State against individuals and to the rights of individuals against the State, and the Law of Nations, receive only slight and incidental treatment. It is to be remarked, the phrase, *jus gentium*, in the Roman law, does not mean the law of nations, as that phrase is used in the foregoing classification of law. The Roman phrase signifies such municipal law as is common to nations generally.*

The classification of law stated in this paper does not include the whole science of law. That embraces: 1. The present law in force in different countries. 2. The descriptive history of law, consisting of a statement of the law in force in different countries at successive dates. 3. The principles of the evolution of law and comparative law. 4. The art of legislation, embracing the application of the knowledge of the evolution and history of law to the moulding of future law by legislatures and courts, and specific measures of law reform.

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* "Kent's Commentaries," 12 ed. vol. I, p. I, n. I.